Filed 12/23/08 Bond v. Hawkins CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ELIZABETH BOND, Plaintiff and Appellant, v. TRENT HAWKINS et al., Defendants and Respondents.	B203921 (Los Angeles County Super. Ct. No. SC091866)

APPEALS from judgments of the Superior Court of Los Angeles County, Jacqueline A. Connor, Judge. Affirmed.

Law Offices of Gary A. Dordick, Gary A. Dordick and David Azizi for Plaintiff and Appellant.

Mark R. Weiner & Associates and Kathryn Albarian for Defendant and Respondent Trent Hawkins.

Law Offices of Baker & Associates and Courtney B. Lockhart for Defendant and Respondent Victoria Larimore.

Elizabeth Bond appeals from judgments entered pursuant to orders granting summary judgment for respondents Trent Hawkins and Victoria Larimore, respectively. This is a personal injury action arising from a dog bite. We conclude that summary judgments in favor of Hawkins and Larimore were proper, and affirm.

FACTUAL AND PROCEDURAL SUMMARY

At all times relevant to this case Bond resided in a rented condominium unit. Hawkins and Larimore each owned and resided in units on the same floor as Bond.

Kevin Granite moved into Hawkins's unit as a roommate in May 2005. When Granite moved in, he brought Trevor, a golden retriever he had owned since July 2000. Shortly after Granite and Trevor moved into the Hawkins unit, Hawkins filled out a pet registration form required by the homeowners association. Hawkins also paid the $250 pet deposit, because Granite could not afford it. On April 1, 2006, Granite moved out of the unit. He took Trevor with him.

On April 30, 2006, Granite left Trevor with Larimore, who occupied another unit in the building, while he went to work. Later that morning, Bond was walking her own dog, Dundee, through the hallway that passed Larimore's door. As Bond approached, the door was open and Larimore was standing in the doorway. Trevor emerged through the open door, and approached Dundee, growling. He did not stop when Larimore called to him. Trevor then jumped on Dundee. When Bond reached toward Dundee's neck to try to pull him away from Trevor, Trevor bit her finger, causing severe injury. On the day this incident took place Hawkins was in Florida on vacation.

Bond filed a complaint against Hawkins, Larimore, and Granite. She alleged strict liability and negligence causes of action against all three defendants. Granite, who filed for bankruptcy protection, is no longer a party to this case.

Hawkins filed a notice of motion for summary judgment on the grounds that "plaintiff's action has no merit and there is no triable issue as to any material fact since: [¶] Defendant Trent Hawkins was not the owner of the dog that allegedly injured plaintiff; [¶] Defendant Trent Hawkins was not the keeper of the dog that allegedly

injured plaintiff; [¶] Defendant Trent Hawkins did not have prior knowledge that the dog had any dangerous propensities." Larimore also filed a motion for summary judgment on almost identical grounds, although she did not disclaim being the keeper of the dog when the injury occurred. In her opposition to Hawkins's motion, Bond maintained that there was evidence to show that Hawkins was a co-owner of the dog. In her oppositions to both motions, Bond claimed there was a triable dispute as to whether the defendants knew of Trevor's dangerous propensities.

The trial court granted both motions for summary judgment. With respect to Hawkins, the court found no triable issue of fact to support a finding that Hawkins was Trevor's owner or had prior knowledge of Trevor's dangerous propensities. With respect to Larimore, the court found no triable issue of fact as to whether Larimore had prior knowledge of Trevor's dangerous propensities. Judgments were subsequently entered in favor of Hawkins and Larimore. Bond appeals from these judgments.

DISCUSSION

"'Summary judgment in a defendant's favor is proper if (1) the defendant shows one or more elements of a cause of action cannot be established, or there is a complete defense to it; and (2) the plaintiff fails to meet the burden of showing the existence of a triable issue of material fact.'" (*Chee v. Amanda Goldt Property Management* (2006) 143 Cal.App.4th 1360, 1368.) "We review a grant of summary judgment de novo; we must decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law." (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348; see Code Civ. Proc., § 437c.)

Bond contends that she satisfied her burden of showing triable disputes as to the facts necessary to establish her causes of action, on multiple theories. As to Hawkins, she argues three theories: statutory strict liability as an owner, common law strict liability as a keeper of an animal with dangerous propensities, and contractual assumed liability. As to Larimore, Bond argues the same common law strict liability and contractual assumed

liability theories. She also argues she should be able to go forward on a general negligence theory against Larimore.

I

Bond alleges Hawkins is strictly liable under Civil Code section 3342, which provides in relevant part, "The owner of any dog is liable for the damages suffered by any person who is bitten by the dog while in a public place or lawfully in a private place, including the property of the owner of the dog, regardless of the former viciousness of the dog or the owner's knowledge of such viciousness." The trial court found Bond could not establish that Hawkins was a co-owner of Trevor. Bond argues that she presented sufficient evidence to put this fact in dispute.

A key piece of evidence relied on by Bond is the pet registration form Hawkins filled out for the homeowners association shortly after Granite and Trevor moved into his unit. At the top of the form are blanks for the unit number, the date of registration, the owner's name, and the tenant's name. Below the blanks is a statement regarding the $250 pet deposit. On the lower half of the form are blanks for the name, type, weight, and description of the pet. Hawkins wrote his own name in the blank as "owner" at the top of the form. Bond argues that this creates a triable issue of fact as to whether Hawkins admitted he was Trevor's owner. Hawkins submitted a sworn declaration stating he wrote his name to identify himself as the owner of the condominium unit, not the owner of the pet. Bond has submitted no evidence to contradict this explanation. Even the layout of the form fails to support Bond's argument, since the blank for owner's name appears between the blanks for unit number and tenant's name, and is separated from the blanks calling for information regarding the pet. The registration form is insufficient to create a dispute as to whether Hawkins was Trevor's owner.

Bond also argues that various admissions by Hawkins, taken together, could allow a trier of fact to infer that Hawkins and Granite were co-owners of Trevor. She points to deposition testimony in which Hawkins stated that he has known Trevor since the time Granite acquired him, and that he saw Trevor regularly and has fed him, walked him, and taken him to the veterinarian. She argues these activities are "indicia of ownership."

The case she relies on, *Ellsworth v. Elite Dry Cleaners, etc., Inc.* (1954) 127 Cal.App.2d 479, is distinguishable. In *Ellsworth*, the court stated that "[t]he personal care and attention" the defendant gave a dog was "not without significance" in its determination that there was sufficient evidence to support the trial court's finding that the defendant was the dog's owner. (*Id*. at p. 483.) More importantly, however, the defendant in that case had purchased the dog, identified himself as the dog's owner, and provided his residential address on the dog's license. (*Ibid*.) In contrast, undisputed evidence in the present case shows that only Granite identified himself as Trevor's owner. Granite stated in his declaration that he was Trevor's sole owner, and had been since 2000. Certificates and receipts for Trevor's veterinary care, attached to Granite's declaration, bear only Granite's name. Hawkins stated in his declaration that he was not, and had never been, Trevor's owner. Hawkins was not present when Granite acquired Trevor, and when Granite moved out of Hawkins's unit he took Trevor with him. That Hawkins helped care for a friend's dog from time to time does not create a triable dispute as to whether he owned the dog.

Since the trial court correctly found there was no triable issue of fact as to whether Hawkins was a co-owner of Trevor, Bond cannot establish the necessary elements for a cause of action for strict liability under Civil Code section 3342 against Hawkins.

II

A person who keeps (rather than owns) a domestic animal he or she knows to have vicious or dangerous propensities abnormal to its class may be held strictly liable. (*Drake v. Dean* (1993) 15 Cal.App.4th 915, 921; *Lundy v. California Realty* (1985) 170 Cal.App.3d 813, 821.) Bond alleged causes of action against both Hawkins and Larimore on this theory. The trial court found that Bond had not produced evidence to create a triable issue of fact as to whether Hawkins was Trevor's keeper or as to whether either Hawkins or Larimore had knowledge of Trevor's dangerous propensities.

A

In the context of liability for a dangerous animal, "'[t]he word "keeper" is equivalent to "the person who harbors." Harboring means protecting.'" (*Buffington v.*

Nicholson (1947) 78 Cal.App.2d 37, 42.) Bond asserts Hawkins had "sufficient possession" and that "Trevor was on the premises because Hawkins and Larimore had units there." She identifies no evidence in support of these assertions. Granite and Trevor already had moved out of Hawkins's unit and were living in an apartment elsewhere when the incident occurred. It is undisputed that Hawkins was in Florida that day. There is a dispute as to whether Trevor and Granite had been in Hawkins's apartment earlier in the day, but it is undisputed that Trevor was in Larimore's unit, under Larimore's care, immediately before the incident. Consequently, we conclude that the trial court did not err in finding there was no triable issue of fact as to whether Hawkins kept or harbored Trevor.

We also conclude there was no triable issue of fact as to Hawkins's knowledge of Trevor's dangerous propensities. A person is not considered to be on notice of a dog's dangerous propensities simply because the dog engages in ordinary, playful canine activities. (See *Yuzon v. Collins* (2004) 116 Cal.App.4th 149, 166 [dangerousness not inferred from dog running out door and frightening neighbor whose dog was on a leash]; *Nava v. McMillan* (1981) 123 Cal.App.3d 262, 267 [barking and jumping against a fence considered ordinary dog activities, not indicative of dangerousness]; *Chandler v. Vaccaro* (1959) 167 Cal.App.2d 786, 790 [chasing motorcycles and snapping at car tires does not give notice of dangerousness].)

In support of his motion for summary judgment, Hawkins submitted a declaration in which he stated: "7. During the time that I knew Trevor he never appeared aggressive or dangerous in any way toward any person. I have never seen Trevor growl or snap at anyone, and was always pleasant and friendly. [¶] 8. Prior to the incident no one has ever complained to me about Trevor being vicious or dangerous. Prior to the incident I never witnessed any incident involving Trevor in which he caused injury to any person. Prior to this incident, I never knew or heard of any incident in which Trevor caused any injury to any person." This shifted the burden to Bond to present evidence to create a triable issue of fact as to whether Hawkins had knowledge of Trevor's dangerous propensities.

In her opposition to summary judgment, Bond presented Hawkins's deposition testimony regarding Trevor's interactions with other dogs. Hawkins testified that when he was with Trevor, if another dog was aggressive, Trevor would be aggressive in return. Hawkins clarified that by "aggressive," he meant barking and getting close to the other dog. Hawkins also stated he would sometimes need to pull on Trevor's leash to restrain him, and that if he encountered a rough-looking dog during their walks, he would cross the street. He testified that Bond's dog, Dundee, was aggressive, so he intentionally kept Trevor away from him. If he saw Dundee in the condominium hallway, he would keep Trevor inside to avoid interaction or fighting between the dogs. None of this evidence creates a triable issue regarding Hawkins's knowledge. Although Bond tries to characterize the evidence as showing a pattern of aggression by Trevor toward other dogs, at most it shows that Trevor would respond to aggression from other dogs with some aggression of his own. Even Trevor's acts of aggression, barking and pulling on a leash, are typical canine behavior, insufficient to support an inference that Trevor was a dangerous dog.

Other evidence relied on by Bond cannot be used to attribute knowledge to Hawkins. Granite testified that he believed Trevor may have been attacked by a large dog in the past, and that he had considered taking Trevor to see a pet psychologist. Assuming anything can be inferred from this evidence regarding Trevor's propensities, it is irrelevant to the question of what Hawkins knew. Bond did not create a triable dispute of fact as to Hawkins's knowledge.

B

With respect to Larimore, the trial court concluded that Bond had presented evidence from which a trier of fact could conclude Larimore kept or harbored Trevor, but found that she did not create a triable issue of fact as to the essential element of Larimore's knowledge. We agree.

In support of her motion for summary judgment, Larimore submitted a declaration in which she declared: "5. During the time that I knew Trevor he never appeared aggressive or dangerous in any way toward any person. I have never seen Trevor growl

or snap at anyone, and Trevor has always been pleasant and friendly. [¶] 6. Prior to the incident, no one has ever complained to me about Trevor being vicious or dangerous. Prior to the incident, I never witnessed any incident involving Trevor in which he caused injury to any person. Prior to the incident, I never knew or heard of any incident in which Trevor caused any injury to any person."

Bond attempted to create a triable issue of fact as to Larimore's knowledge of Trevor's dangerous propensities with Larimore's deposition testimony regarding Trevor. Larimore testified Granite told her Trevor had been attacked by a large dog before Granite owned him, and advised her to avoid large dogs that seemed "a little bit tough." This is even less probative than the evidence Bond produced regarding Hawkins's knowledge. That Larimore was asked to keep Trevor away from dogs that would remind him of a prior bad experience does not create a triable dispute of fact as to whether she knew he was dangerous. Bond also claims Larimore said Trevor seemed "pent-up and frustrated." The source of this quote is a single page pulled from the transcript of Larimore's deposition, and nowhere on this page is Trevor identified as the dog Larimore is describing. In fact, the "pent-up" quote seems to be about Bond's dog, although it is impossible to be sure from the small excerpt of the transcript in the record.

In support of her opposition to Larimore's summary judgment motion, Bond also submitted a declaration from an expert on canine behavior. This person opined that Trevor had aggression issues with other dogs. Bond quotes his conclusions at length to support her argument that Larimore knew of Trevor's dangerous propensities. Regardless of what the expert concluded about Trevor's propensities, his opinion sheds no light on what Larimore actually knew.

The trial court did not err in finding that there was no triable issue of fact as to whether Hawkins or Larimore had actual knowledge of Trevor's dangerous propensities. Consequently, Bond cannot establish the necessary elements for a cause of action for strict liability for the keeper of a dangerous animal against either respondent.

III

Bond contends that she should be able to go forward with a cause of action for general negligence against Larimore, arising from Larimore's failure to control Trevor. "The common law recognizes negligence as a distinct legal theory of recovery for harm caused by domestic animals that are not abnormally dangerous. Restatement Second section 518 provides: ' . . . one who possesses or harbors a domestic animal that he does not know or have reason to know to be abnormally dangerous, is subject to liability for harm done by the animal if, but only if . . . (b) he is negligent in failing to prevent the harm.'" (*Drake v. Dean*, *supra*, 15 Cal.App.4th at p. 924.) A necessary element of negligence is a legal duty to the plaintiff. (*Chee v. Amanda Goldt Property Management*, *supra*, 143 Cal.App.4th at p. 1369.) Larimore's summary judgment motion challenged Bond's ability to establish the element of duty. "Duty, being a question of law, is particularly amenable to resolution by summary judgment." (*Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 465.)

"'"Generally, one owes a duty of ordinary care not to cause an unreasonable risk of harm to others."'" (*Salinas v. Martin* (2008) 166 Cal.App.4th 404, 411; see also Civ. Code, § 1714.) With respect to the keeper of a domestic animal that is not abnormally dangerous, the duty is "commensurate with the character of the animal." (*Drake v. Dean*, *supra*, 15 Cal.App.4th at p. 924.) Consequently, "[k]eepers of such 'domestic animals [which are] of a class that can be confined to the premises of their keepers or otherwise kept under constant control without seriously affecting their usefulness . . . are under a duty to exercise reasonable care to have them under a constant and effective control.' (Rest.2d, § 518, com. e.) . . . . [¶] On the other hand, '[t]here are certain domestic animals so unlikely to do harm if left to themselves and so incapable of constant control if the purpose for which it is proper to keep them is to be satisfied, that they have traditionally been permitted to run at large. This class includes dogs. . . . Although it is not impossible to confine dogs to the premises of their keepers or to keep them under leash when taken into a public place, they have been traditionally regarded as unlikely to do substantial harm if allowed to run at large, so that their keepers are not required to

keep them under constant control. . . . However, although the possessor or harborer of a dog . . . is privileged to allow it to run at large and therefore is not required to exercise care to keep it under constant control, he is liable if he sees his dog . . . about to attack a human being or animal or do harm to crops or chattels and does not exercise reasonable care to prevent it from doing so.' (Rest.2d, § 518, com. j.)" (*Id*. at p. 925.) In short, the duty of the dog's keeper is to exert as much control as is necessary to prevent foreseeable harm. (*Ibid*.)

Bond contends it was foreseeable Trevor would escape and cause injury if Larimore left her door open and did not have Trevor on a leash. Her evidence regarding foreseeability is essentially the same evidence she produced to show Larimore had knowledge of Trevor's dangerous propensities. Her opposition to Larimore's summary judgment motion claimed, "It was foreseeable that when Trevor would be aggressive towards other dogs especially Ms. Bonds [*sic*] dog who lived on the same floor, a person like Plaintiff Ms. Bond would get bit." She also points to the declaration of her expert witness, who opined that Larimore's act of leaving the door open was "grossly negligent." However, we agree with the trial court's assessment that the expert "steps completely outside his expertise by opining about Ms. Larimore's knowledge and the legal appropriateness of her actions and conduct on the date in question."

Bond did not produce evidence that Trevor had a propensity to be the initial aggressor, that his aggression had ever progressed beyond barking or growling, or that he had ever run away from his caretaker to initiate a confrontation. Nor did she present evidence of Trevor behaving aggressively toward a person, much less biting a person. Under these circumstances, the foreseeable harm was not such that Larimore had a legal duty not to open her door without restraining Trevor.

The trial court did not err in concluding Bond failed to establish the duty of care element essential to a negligence action.

IV

Attached to both of Bond's oppositions to summary judgment were copies of a document titled, "Park Wellington Rules and Regulations."[1] One of the provisions in the document states, "Owners who permit pets on the premises assume all liability for any and all damage to property or bodily harm resulting from their being on Park Wellington Common Area." Bond contends the rules and regulations provide a basis for a cause of action against Hawkins and Larimore, on a theory of contractually assumed liability.

Bond's complaint included no allegations regarding liability for Hawkins or Larimore on a contract theory. Furthermore, no facts regarding the condominium's rules and regulations are alleged in the complaint. Nonetheless, in her opposition to Hawkins's motion for summary judgment, Bond argued that, pursuant to the rules and regulations, Hawkins had assumed responsibility for any harm caused by Trevor. In her opposition to Larimore's motion for summary judgment, Bond made the same claim. Bond now argues that Hawkins and Larimore failed to negate the contractual assumption of liability theory in their motions for summary judgment. Anticipating the response that the respondents did not negate the theory because it had not been pled, Bond contends the trial court should have given her an opportunity to amend her complaint rather than granting summary judgment. Yet, Bond does not claim that she requested leave of the trial court to amend, nor do we find any indication in the record that she did.

"[S]ummary judgment cannot be denied on a ground not raised by the pleadings." (*Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1663, italics omitted; see also Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2008) ¶ 10:16 et seq., p. 10-3 et seq. ["The pleadings serve as the 'outer measure of materiality' in a summary judgment motion."].) "If either party wishes the trial court to consider a previously unpleaded issue in connection with a motion for summary judgment, it may request leave to amend. [Citations.] Such requests are routinely and liberally granted. However, '"'[i]n the absence of some request for amendment there is

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[1] Park Wellington appears to be the name of the condominium complex where the parties reside.

no occasion to inquire about possible issues not raised by the pleadings.'"'" (*Bostrom v. County of San Bernardino*, *supra*, at pp. 1663-1664.) A plaintiff's opposition to a motion for summary judgment is not a substitute for an amendment to the pleadings. (*Willard v. Hagemeister* (1981) 121 Cal.App.3d 406, 414.) Bond forfeited the opportunity to defeat summary judgment on a contract theory by failing to amend her complaint to add allegations regarding the condominium rules and regulations. (See *Lopez v. Baca* (2002) 98 Cal.App.4th 1008, 1019 [plaintiff could not rely on a negligence per se theory to defeat summary judgment when such allegations were not in the complaint and no motion was made to amend the complaint].)

The cases that Bond cites do not compel a different result. *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 719, footnote 5, and *Soderberg v. McKinney* (1996) 44 Cal.App.4th 1760, 1772, state that the trial court should allow a plaintiff to amend the complaint when it appears that a deficiency in the complaint can be cured. Similarly, *Honig v. Financial Corp. of America* (1992) 6 Cal.App.4th 960, 965, held that the trial court should have granted the plaintiff's motion to amend. None of these cases relieve the plaintiff of the obligation to request leave to make an amendment in order to add new allegations to avoid summary judgment.

Bond also argues, "Liberally construed, the complaint encompasses liability based on the CC&R [covenants, conditions, and restrictions] and HOA [homeowners association] rules." To the contrary, there is not even a fleeting reference to such a theory in the complaint, nor does any factual basis for this theory appear in the complaint. There is no mention of the rules and regulations, the homeowners association, CC&R's, contractual liability, or assumption of liability anywhere in the complaint. The policy of liberal construction is constrained by the requirement that the pleading apprise the defendant of the factual basis of the plaintiff's claim. (See *Davaloo v. State Farm Ins. Co.* (2005) 135 Cal.App.4th 409, 415.) Bond did not satisfy this requirement with regard to liability based on the existence of a contract.

Contractual assumption of liability was not an issue encompassed by the pleadings and therefore does not provide a basis for denying summary judgment in favor of Hawkins and Larimore.

DISPOSITION

The judgment is affirmed. Respondents shall have their costs on appeal.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.